Supreme Court, U. S.
FILED
OCT 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1472

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

vs.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, SR., THE CITY OF TORRANCE, and THE CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondent The City of Los Angeles.

BURT PINES,
City Attorney,
JOHN B. RICE,
Senior Assistant City Attorney,
FREDERICK N. MERKIN,
Assistant City Attorney,
1800 City Hall East,
200 North Main Street,
Los Angeles, Calif. 90012,
(213) 485-6597,
Attorneys for Respondent The City of Los Angeles.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Question Presented 1

Introduction and Summary of Argument 3

Statement 4

A. The Hyperion Treatment Plant 4

B. Permitting History of the Hyperion Treatment Plant Outfalls 5

1. Board Order No. 74-329, EPA NPDES Permit No. CA 0109991 5

2. Board Order No. 75-100, NPDES Permit No. CA 0109991 5

3. Board Order No. 75-165 6

4. Board Order No. 76-80 7

5. Board Order No. 76-202 8

6. Board Order No. 77-1, NPDES Permit No. CA 0109991 8

7. Board Order No. 77-29 8

8. Board Order No. 77-84 8

9. The Action in Question 9

C. The EPA Enforcement Action 11

Argument 13

The City Was Denied an "Opportunity for Public Hearing" 13

I.

The Notice Was Inadequate 13

II.

Inadequate Notice Is a Legal Infirmity 14

III. Page

National Land Operators' Association v. Kleppe Is Distinguishable on the Notice Issue 17

Conclusion 19

TABLE OF AUTHORITIES CITED

Cases Page

Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 17 L.Ed. 531 (1864) 15

City of Santa Clara, Cal. v. Andrus, 572 F.2d 660 (9th Cir. 1978), cert. denied, ... U.S. ....., 99 S.Ct. 176-177, ... L.Ed.2d ..... (1978) 15

Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914) 15

Lewis v. Richardson, 428 F.Supp. 1164 (D. Mass. 1977) 15

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) 16

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) 15, 16

National Land Operators' Association v. Kleppe, 423 U.S. 388, 96 S.Ct. 809, 46 L.Ed.2d 580 (1976) 17

Pembina Con. Silver Mining etc., Co. v. Pennsylvania, 125 U.S. 181, 8 S.Ct. 737, 31 L.Ed. 650 (1888) 15

Riley v. Stack, 128 Cal.App. 480, 18 P.2d 110 (1932) 15

South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) 15

Constitutional Provisions

United States Constitution, Fifth Amendment 14

United States Constitution, Fourteenth Amendment.. 15

Regulations — Page

Code of Federal Regulations, Title 40, Sec. 125.58 (e)(2) (44 Federal Register 34816, June 15, 1979) 10

Rules

Federal Rules of Appellate Procedure, Rules 15-20.. 11

Statutes

Administrative Procedure Act (5 U.S.C. §§554, 556, and 557) 1, 2

Clean Water Act, Sec. 301(b)(1)(B) (33 U.S.C. §1311(b)(1)(B)) 6

Clean Water Act, Sec. 301(h) (33 U.S.C. §1311 (h)) 6, 10

Clean Water Act, Sec. 301(i) (33 U.S.C. §1311 (i)) 6

Clean Water Act, Sec. 309 (33 U.S.C. §1319) 11

Clean Water Act, Sec. 402(a)(1) (33 U.S.C. §1342(a)(1)) 1, 13, 15

Clean Water Act, Sec. 402(d)(2) (33 U.S.C. §1342(d)(2)) 13

Clean Water Act, Sec. 509(b)(1) (33 U.S.C. §1369(b)(1)) 11

Federal Coal Mine Health and Safety Act of 1969, Sec. 109(a)(3), 83 Stat. 742 (30 U.S.C. §§801 et seq.) 17

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1472

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

vs.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, SR., THE CITY OF TORRANCE, and THE CITY OF LOS ANGELES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondent The City of Los Angeles.

QUESTION PRESENTED.

Respondent The City of Los Angeles ("City" hereinafter) does not accept the "question presented" as stated in the Brief for the Petitioner ("Pet. Br." hereinafter) 2.

First, the petitioner[1] has introduced the question of whether the "public hearing" contemplated by Clean Water Act section 402(a)(1) [33 U.S.C. §1342(a)(1)] is the adjudicatory hearing of the hearing provisions of the Administrative Procedure Act ("APA"

[1]For convenience of expression, petitioner Douglas M. Costle, Administrator of the United States Environmental Protection Agency ("EPA" hereinafter), will be referred to by the name of the agency he heads, the EPA.

hereinafter) [5 U.S.C. §§554, 556, and 557]. The question on which certiorari was granted concerned "adjudicatory hearings," see Petition for a Writ of Certiorari ("Pet. Cert." hereinafter) 2; Appendix ("App." hereinafter) 208, whereas the question presented by the EPA now concerns "APA-type adjudicatory hearings." The applicability of the APA was not addressed in the Petition, but it is dealt with in the EPA's brief on the merits. See Pet. Br. 30-33.

Second, the question as presented will not allow for disposition of the case because it erroneously states certain facts and omits others. The question improperly assumes that "due notice of the proposed action" had been given in the instant case, which assumption is not warranted by a fair reading of the record or the decision below. The court below found that notice had been given the City of the proposed EPA action, Pet. Cert. 6a, but it never held that such notice was adequate. The court went no further than to observe that the "failure of the city to request a hearing *may suggest* that it does not contest any of the facts supporting the issuance of the permit . . . ." (Emphasis added.) Pet. Cert. 19a fn. 3.

Clearly, the adequacy of notice (not only to the City but to the other respondents as well) is an issue that cannot be assumed away by the EPA and necessarily must be before this Court for consideration. Adequacy of notice is an essential element of an "opportunity" for a public hearing.

The question presented also fails to take into account that the decision of the court below was based, in part, upon (a) the EPA's failure to conduct a hearing despite the known opposition to its proposal to use

the Palos Verdes landfill, Pet. Cert. 19a fn. 3, (b) special circumstances resulting from the division of jurisdiction over the Hyperion outfalls, Pet. Cert. 21a-22a, and (c) the absence from the record of any explanation of the June 2, 1977 extension. Pet. Cert. 22a.

INTRODUCTION AND SUMMARY OF ARGUMENT.

The court below remanded the matter to the EPA for a "proper hearing," Pet. Cert. 24a, because the EPA bears the burden of demonstrating that a hearing is unnecessary, that is, that material facts are not in dispute. Pet. Cert. 18a-19a. The EPA argues that it bears no such burden, but rather, maintains that it does all it must do to provide the "opportunity" for hearing by making hearings available on request, as provided by their regulations.

Respondents Pacific Legal Foundation and John B. Kilroy, Sr., in their brief, address themselves primarily to (a) whether "opportunity" is limited to the availability of a hearing on request and (b) whether they were given such an opportunity. The City's brief considers whether the City was afforded such an "opportunity."

The City was not afforded an "opportunity for public hearing" because the notice it received was inadequate. The notice failed to disclose that the proposed EPA action would extend a permit containing a sludge-out compliance schedule which the EPA believed to be in effect despite the subsequent issuance by State authorities of a permit containing a less demanding sludge-out schedule, which permit had not been vetoed by the EPA although it had the power to do so.

The EPA's failure to give adequate notice deprived the City of due process of law under principles long ago laid down by this Court and for the same reason deprived the City of its statutory right to an "opportunity for public hearing".

STATEMENT.

The City accepts the statement of facts and proceedings provided by the EPA, see Pet. Br. 6-17, as corrected and supplemented by the brief filed by respondents Pacific Legal Fundation and John B. Kilroy, Sr. and as set forth herein.

A. The Hyperion Treatment Plant.

The City's Hyperion Treatment Plant treats most of the City's sewage and discharges the treated sewage through three outfalls extending into the Pacific Ocean. All such sewage receives primary treatment; about thirty percent (30%) receives secondary treatment by the activated sludge process. App. 3.

Combined treated effluent (primary and secondary) is discharged through an outfall terminating 26,525 feet (about 5 miles) from shore at a depth of 187 feet. Separated solids are disgested, screened, and diluted (one volume digested sludge with three volumes secondary effluent) prior to discharge through an outfall terminating 35,572 feet (about 7 miles) from shore at a depth of 300 feet at the head of a submarine canyon. App. 3-4. An emergency outfall (to handle increased flow during wet weather and when power fails at the pumping plant) extends 5,364 feet (about 1 mile) to a depth of 50 feet. App. 4.

B. Permitting History of the Hyperion Treatment Plant Outfalls.

Altogether, discharges from the Hyperion outfalls have been regulated by nine[2] discharage permits issued over approximately the past five years. Five such permits were issued by the California Regional Water Quality Control Board, Los Angeles Region ("the Board" hereinafter) acting alone and without rejection of any such issuance by the EPA. Three other permits were issued by the Board and the EPA acting jointly. One such permit, the one in question, was issued by the EPA acting alone.

1. Board Order No. 74-329, EPA NPDES Permit No. CA 0109991.[3]

This permit was the first and was jointly issued on November 18, 1974. It dealt exclusively with the five-mile (treated effluent) and one-mile (emergency) outfalls. The seven-mile sludge outfall was not regulated. The permit contained an expiration date of June 1, 1977. See Pet. Cert. 4a.

2. Board Order No. 75-100, NPDES Permit No. CA 0109991.

This permit was jointly issued on August 18, 1975. App. 3-50. It rescinded the 1974 permit and regulated all three outfalls. It introduced a discharge prohibition

---

[2]The EPA counts twelve, presumably by regarding the jointly issued permits as constituting separate permitting actions by the two involved agencies. See Pet. Br. 10 fn. 6.

[3]The EPA has regulated the Hyperion discharges by means of National Pollutant Discharge Elimination System ("NPDES" hereinafter) "permits" where the Board has acted by "orders." Each Board order was given a different number whereas the EPA from the very beginning ascribed the same number to its permits. For convenience, all permitting actions affecting the Hyperion outfalls will be referred to hereinafter as "permits."

of sludge, in accordance with a schedule of compliance. App. 12. The schedule provided for the removal of not less than one-third of the existing discharge in each of three phases. Completion of the phases was scheduled for 18, 24, and 30 months from the "date of concept approval."[4] App. 12, 18.

Much as the 1974 permit, this permit also set specific effluent limitations for the outfalls, App. 6-12, receiving water limitations, App. 13-15, and general requirements. App. 15-17. In addition to sludge, as in the 1974 permit, compliance schedules were established to provide for full secondary treatment.[5] App. 17-18. The permit contained an expiration date of February 1, 1977. App. 21.

3. Board Order No. 75-165.

This permit, issued on December 1, 1975 by the Board alone[6] and without veto by the EPA, recited that 75-100 and the NPDES permit contained a sludge-out schedule "related" to "concept approval", that "con-

---

[4]The EPA erroneously states that 75-100 set target dates of April 1, 1977, October 1, 1977, and April, 1978. *Compare* Pet. Br. 11 fn. 7 *with* App. 18.

[5]Pursuant to Clean Water Act section 301(i) [33 U.S.C. §1311(i)], on or about June 9, 1978 the City applied for an extension of the July 1, 1977 secondary treatment deadline established by Clean Water Act section 301(b)(1)(B) [33 U.S.C. §1311(b)(1)(B)]. The City has also applied for a modification (*i.e.*, waiver) of the secondary treatment requirement, pursuant to Clean Water Act section 301(h) [33 U.S.C. §1311(h)]. See note 9 *infra.*

[6]The EPA improperly characterizes orders 75-165, 76-80, 76-202, and 77-29 as affecting "only the state's compliance schedule for the sludge management project." See Pet. Br. 11 fn. 6.

cept approval" was given on October 1, 1975,[7] and that the EPA was "administratively modifying the NPDES permit to substitute definite dates in the time schedule for compliance with the sludge discharge prohibition." App. 51. Based on the stated date of concept approval, this permit supplied the dates for the three phases of the sludge-out schedule which in 75-100 has been keyed to "months from date of concept approval." The dates for completion of the three phases were April 1, 1977, October 1, 1977, and April 1, 1978. App. 53. 75-100 was otherwise left unchanged. App. 52.

4. Board Order No. 76-80.

This permit, issued on May 24, 1976 by the Board alone and without veto by the EPA, changed the sludge-out compliance schedule from three phases of one-third removal each to four phases of one-quarter removal each. The dates given were August 1, 1978, April 1, 1979, October 1, 1979, and April 1, 1980. App. 57. 76-80 found that the City had failed to meet the April 1, 1976 deadline for "completion of approvable plans and specifications for Phases I, II, and III," which made it "highly probable that the City will fail to meet the subsequent completion dates for the remaining tasks described above." App. 55-56.

---

[7]Conditional concept approval was given by the California State Water Resources Control Board on such date. See Pet. Cert. 4a-5a. The City does not concede that concept approval was then or at any other time given by the EPA.

5. Board Order No. 76-202.

On November 22, 1976 the Board, acting alone and without veto by the EPA, amended 76-80 to adjust the date for submittal of final plans and specifications necessary to meet Phase I from January 1, 1977 to November 1, 1977. App. 60-61. The City had advised the Board that it would be unable to meet the January 1, 1977 deadline.[8] App. 60. 76-80 was left intact in all other respects. App. 62.

6. Board Order No. 77-1, NPDES Permit No. CA 0109991.

On January 24, 1977 this jointly issued permit expressly found that the Board had adopted 75-165, 76-80, and 76-202 "amending the time schedules contained in Order No. 75-100." App. 93. This permit extended the expiration date of 75-100 from February 1, 1977 to June 30, 1977, 75-100 remaining intact in all other respects. App. 95.

7. Board Order No. 77-29.

This permit was issued on February 28, 1977 by the Board alone and without veto by the EPA. It amended 76-80's sludge-out schedule by modifying a provision relating to trucks (for hauling dewatered sludge). App. 104-107. 76-202 was rescinded. 76-80 was in all other respects left intact. App. 107.

8. Board Order No. 77-84.

On May 23, 1977 this permit was issued by the Board alone and without veto by the EPA. This permit found that 75-100 had been amended by 75-165 and

[8]The EPA pejoratively and unjustifiably refers to the City's inability to meet this deadline as "delays." See Pet. Br. 11 fn. 6.

77-1, made no reference to 76-80 and 76-202, and noted 75-100's expiration date of June 30, 1977. App. 154. It further found that the EPA was "administratively modifying the expiration date of the NPDES permit to extend the permit to the full five-year statutory length as provided in the Federal Water Pollution Control Act and has requested that Order No. 75-100 be extended for the same period." App. 154-155. The permit provided that it was to "serve as part of" an NPDES permit in the absence of objections by the EPA Regional Administrator. App. 155-156. It rescinded 77-1, extended the expiration date of 75-100 to December 17, 1979, and left 75-100 intact in all other respects. App. 156.

The letter advising the City of the Board's proposed action, which became 77-84, stated that the Board "will consider extending the expiration date of Order No. 75-100 (NPDES Permit No. CA 0109991) to December 17, 1979." App. 123.

9. The Action in Question.

By a letter of April 26, 1977 the City was advised of proposed "modifications" to NPDES Permit No. CA 0109991, which modifications became the June 2, 1977 permit extension. App. 115-116. This letter did not describe the proposed modifications but enclosed a copy of the "public notice" relating thereto. App. 115. The public notice's entire description of the proposed modification was that the "Regional Administrator proposes to extend the expiration date of the permit from June 30, 1977 to December 17, 1979. All other terms and conditions of the permit would remain unchanged." App. 118. No further description of the proposed action and no explanation were provided. The

permit referred to was NPDES Permit No. CA 0109991 issued on December 18, 1974, App. 117, the permit which had been expressly rescinded on August 18, 1975. App. 20.

Both the April 26, 1977 letter and the public notice advised the City that comments on the proposed modifications or a request for a public hearing could be submitted within thirty (30) days of the public notice. App. 115, 119. The public notice further advised the City of the availability of a request for an adjudicatory hearing with ten (10) days following receipt of the final determination. App. 120.

By a letter of June 2, 1977 the EPA transmitted a final determination to extend the expiration date of NPDES Permit No. CA 0109991 from June 30, 1977 to December 17, 1979.[9] App. 149. The City did not request either hearing and no hearing was held, despite the existence of a major controversy over

[9]The June 2, 1977 action extended either the 1974 permit or the 1975 permit. By an application dated July 30, 1976, the City had applied for a *new* NPDES permit. See Certified Administrative Record ("AR" hereinafter), documents 3-5, pages 44-118. It was apparently decided that the existing permit should be extended rather than a new one be issued, see AR, document 6, at page 119, and hence the City's 1976 application remains pending. In addition, on or about September 12, 1979 the City applied for a permit which would "modify" (*i.e.*, waive) the secondary treatment requirement, pursuant to Clean Water Act section 301(h) [33 U.S.C. §1311(h)]. EPA regulations implementing section 301(h) provide, and the City's application included, a "signed, completed NPDES application Standard Form A, Parts I, II, and III." 40 C.F.R. §125.58(e)(2) (44 Fed. Reg. 34816, June 15, 1979). Finally, on or about October 1, 1979 the City submitted, as a precautionary measure, separate applications to the EPA and the Board for a joint permit for the Hyperion outfalls.

the Hyperion Treatment Plant Interim Sludge Project.[10]

C. The EPA Enforcement Action.

On August 12, 1977, slightly more than two months after its most recent permitting action and well after the time for requesting a hearing on the June 2, 1977 extension had passed, the EPA caused an action to be filed in federal district court under Clean Water Act section 309 [33 U.S.C. §1319] to enforce the NPDES permit issued on August 18, 1975.[11] App.

[10]The project consisted of trucking dewatered sludge to a landfill in Palos Verdes. A letter of December 9, 1976 from the City to the EPA protested the EPA's decision on November 18, 1976 to fund the project without the preparation and consideration of an environmental impact statement, the City expressing its concern about the environmental impacts of the project. App. 63-72. A letter of November 30, 1976 from the Pacific Legal Foundation to the EPA expressed similar concerns and questioned the legal basis for the EPA's prohibition against the ocean discharge of sludge. App. 84-88.

On April 18, 1977 the EPA, by an affidavit filed with the court in another case, admitted the existence of "the controversy regarding the Hyperion Interim Sludge Project which arose subsequent to the issuance of the Negative Declaration and Environmental Impact Appraisal. . . ." App. 111.

[11]*United States of America v. City of Los Angeles, et al.*, No. CV 77-3047-HP (C.D. Cal.). It should be kept in mind that inasmuch as the instant case began as petitions for review under Clean Water Act section 509(b)(1) [33 U.S.C. §1369(b)(1)], its focus has been upon the adequacy of EPA's administrative record supporting the June 2, 1977 extension. See Rules 15-20 of the Federal Rules of Appellate Procedure. This case has not concerned itself in a major way with the enforceability of the three-phase sludge-out schedule of 75-100. If necessary, that issue will be dealt with in a more substantial fashion in the enforcement action where, unlike this proceeding, the parties can develop a fuller factual record (*e.g.*, though discovery and the cross-examination of witnesses). Proper subjects for detailed consideration in the enforcement action will be the perceptions and intentions of the EPA, Board, and City relative to the various sludge-out schedules.

181-189. The complaint alleged violations of the permit, which included allegations that the City had failed to meet certain deadlines in the three-phase sludge-out compliance schedule. App. 183-189. Civil penalties were sought as well as a mandatory injunction to impose the four-phase sludge-out schedule contained in 76-80, although no express reference was made to 76-80. App. 187-189. The complaint made no express reference to any Board action, although the permit it sought to enforce, which was attached as an exhibit, was a jointly issued permit. In enforcing the three-phase sludge-out schedule of 75-100, the EPA relied upon an alleged granting of "concept approval" (which would trigger the schedule) by the California State Water Resources Control Board. App. 184.

ARGUMENT.

THE CITY WAS DENIED AN "OPPORTUNITY FOR PUBLIC HEARING".

The City was not afforded the "opportunity for public hearing" mandated by Clean Water Act section 402(a)(1) [33 U.S.C. §1342(a)(1)] on the June 2, 1977 permit extension because it was not given adequate notice of the proposed action. The notice was inadequate because it failed to inform the City that the EPA regarded the three-phase sludge-out schedule of 75-100 to be in effect despite the Board's subsequent issuance of 76-80, which contained a more lenient four-phase schedule.

I.

The Notice Was Inadequate.

The permitting history of the Hyperion Plant is one of confusion and uncertainty. By issuing permits for the Hyperion outfalls, both the EPA and the Board were claiming at least some degree of jurisdiction over them although the nature and extent of each agency's jurisdiction was unclear. This jurisdictional uncertainty was not finally resolved until the decision below. While acting in concert in issuing the first two permits jointly, on December 1, 1975 the Board began the practice of occasionally, but not always, acting alone—a practice of the EPA tolerated by its nonexercise of its veto right under Clean Water Act section 402(d)(2) [33 U.S.C. §1342(d)(2)]. Although the EPA never vetoed any of the Board's actions, it nonetheless regarded itself free, when it filed its enforcement action, to adopt after the fact those State actions which served its purposes. Thus, on the one hand, in its complaint filed in the enforcement action the EPA alleged that

the State had given "concept approval" on October 1, 1975, so as to trigger the three-phase sludge-out schedule of 75-100. Yet, on the other hand, in the same complaint it chose to ignore entirely any of the Board's actions, most significantly 76-80, which had changed 75-100's three-phase sludge-out schedule to a four-phase schedule extending the date for total sludge-out by two years.

The court below noted that the record is "barren of any explanation of the extension of June 2, 1977." Pet. Cert. 22a. If its purpose was to restore the three-phase sludge-out schedule of 75-100, the notices sent to the City did not make this clear. The only message conveyed by the notices from both the EPA and the Board was that NPDES Permit No. CA 0109991 and 75-100 would be extended to December 17, 1979. Considering that the City had been given reason to believe that the four-phase schedule and the April 1, 1980 date for complete sludge-out would be in effect, see App. 64, adequate notices would have made clear that the EPA intended to revivify[12] the three-phase sludge-out schedule of 75-100.

II.

Inadequate Notice Is a Legal Infirmity.

In failing to give the City adequate notice of its intended action, it denied the City due process of law[13] and an "opportunity for public hearing" within

[12]In point of fact, this was impossible. By June 2, 1977 the City was already substantially behind the target dates set forth in 75-100 as modified by 75-165.

[13]This Court has apparently not ruled on the question of whether a municipal corporation, such as the City, is a "person" for purposes of the Fifth Amendment's Due Process Clause. The Court has ruled, on the one hand, that a state

the meaning of Clean Water Act section 402(a)(1) [33 U.S.C. §1342(a)(1)]. This Court has long held that adequate notice is an essential element of due process. Thus it was stated, in *Baldwin v. Hale,* 68 U.S. (1 Wall.) 223, 233, 17 L.Ed. 531 (1864), that "parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." In *Grannis v. Ordean,* 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914), it was stated that the "fundamental requisite of due process of law is the opportunity to be heard."

More recently, in the familiar case of *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), which concerned the adequacy of the *form* of notice given, the Court articulated the fundamental relationship of notice to a fair hearing:

is not a "person" under the Clause, *South Carolina v. Katzenbach,* 383 U.S. 301, 323-324, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), while, on the other hand, it has found the private corporation to be a "person" protected by the Fourteenth Amendment's Equal Protection Clause. *Pembina Con. Silver Mining etc., Co. v. Pennsylvania,* 125 U.S. 181, 188-189, 8 S.Ct. 737, 31 L.Ed. 650 (1888). The court below in another case has opined that a municipal corporation could be protected by the Due Process Clause. *City of Santa Clara, Cal. v. Andrus,* 572 F.2d 660, 675 (9th Cir. 1978) (dictum), *cert. denied,* ..... U.S. ....., 99 S.Ct. 176-177, ... L.Ed.2d ..... (1978); *but see, Lewis v. Richardson,* 428 F.Supp. 1164, 1167 fn. 3 (D. Mass. 1977) (equal protection); *but cf., Riley v. Stack,* 128 Cal.App. 480, 18 P.2d 110, 111 (1932) (county not a "person" under Fourteenth Amendment Due Process Clause).

The substantial regulation of municipalities by the Federal Government, such as pursuant to the Clean Water Act, militates in favor of affording municipalities protection of the Clause. They are treated much in the same fashion as other "persons." In any event, the Court need not rule on this question here because the protections afforded by the Due Process Clause surely inhere in the statutory language "opportunity for public hearing" of Clean Water Act section 402(a)(1) [33 U.S.C. §1342(a)(1)].

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. at 313.

"The right to be heard has little validity or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U.S. at 314.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*

"The notice must be of such nature as reasonably to convey the required information. . . ." *Id.*

The importance of the *content* of notice was recently indicated by the Court in *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). The Court there held that due process required a municipal utility to notify its customers of the availability of an avenue of redress should they wish to contest charges on their bills. The Court found that the notice given in that case was not "reasonably calculated" to provide customers with that information. *Id.*, at 14.

The notice given to the City in the instant case failed to disclose that the EPA regarded the three-

phase sludge-out schedule of 75-100 to be in effect, the more recently issued four-phase schedule of 76-80 notwithstanding. And sludge, it should be noted, was the focus of disagreement between the City and the EPA. See, *e.g.*, App. 63-72, 202. Adequate notice of the EPA's intentions regarding sludge may very well have induced the City to request a hearing on the proposed extension. Clearly a hearing would have disclosed the EPA's intentions.[14]

III.
National Land Operators' Association v. Kleppe Is Distinguishable on the Notice Issue.

The inadequacy of the notice given the City distinguishes the instant case from *National Land Operators' Association v. Kleppe*, 423 U.S. 388, 96 S.Ct. 809, 46 L.Ed.2d 580 (1976), a case relied upon by the EPA. That case concerned section 109(a)(3) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742 [30 U.S.C. §§801 *et seq.*], which empowers the Secretary of the Interior to assess civil penalties for health and safety standard violations only after operators charged with such violations have been

---

[14]A hearing would have also fostered coordination between the EPA and the Board in its dealings with the City. The Court below noted:

"Among the special circumstances of this case is the division of jurisdiction over discharges in the ocean between the federal and state authorities which *significantly complicates compliance by an affected agency*. It becomes both possible and tempting for each authority to *deny responsibility by attributing the command in question to the other*. The ease with which this can be done increases as the opportunities for confrontation in a hearing setting diminish. Considerations such as these may properly influence our decision about whether a hearing in the situation before us would be useless." (Emphasis added.) Pet. Cert. 21a-22a.

given an "opportunity for a public hearing." The regulations challenged in that case provided for the issuance of proposed orders containing penalty assessments. *Id.*, at 394.

The message conveyed by a notice that an agency proposes to assess a penalty is far different from that conveyed in the instant case. The issuance of an NPDES permit is a licensing action of great complexity. One need only briefly consider the detailed effluent limitations, receiving water limitations, compliance schedules, and other technical requirements (not to mention the legal framework they presumably implement), see 75-100, for example, App. 3 *et seq.*, to understand the problems faced by a discharger in comprehending what the EPA intends to do. Conversely, notice of a penalty assessment conveys a message that is not lost on its recipient. Even if the reasons for the proposed penalty are obscure, the agency's intended action is unmistakably clear. This very distinction, in substance, was articulated by the court below. Pet. Cert. 19a fn. 3.[15]

As a consequence, even if this Court were to agree with the EPA that the "opportunity for public hearing" requires only that such a hearing be made available upon request, the failure of the EPA to give the City adequate notice constituted a denial of any meaningful "opportunity" to request a hearing.

---

[15]The court below did not find the EPA's notice to the City to be adequate. It went no further than to observe that "the failure of the city to request a hearing *may suggest* that it does not contest any of the facts supporting the issuance of the permit. . . ." (Emphasis added.) Pet. Cert. 19a fn. 3.

CONCLUSION.

For the foregoing reasons, the City respectfully requests that the decision below be affirmed.

Respectfully submitted,

BURT PINES,
City Attorney,
JOHN B. RICE,
Senior Assistant City Attorney,
FREDERICK N. MERKIN,
Assistant City Attorney,
Attorneys for Respondent
The City of Los Angeles.

October, 1979